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No. 88-668

IN THE
SUPREME COURT OF THE UNITED STATES
1988

STATE OF COLORADO,

Petitioner,

vs.

ANTONIO HARRIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A. Whether custodial interrogation on less than probable cause in violation of Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), becomes lawful simply because Miranda rights are given prior to questioning?

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CONSTITUTIONAL AND REGULATORY PROVISIONS

Constitution of the United States:

Amendment IV. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Colorado Rules of Criminal Procedure,

Rule 41.1. Court Order for Non-testimonial Identification

(a) Authority to Issue Order. A non-testimonial identification order authorized by this Rule may be issued by any judge of the Supreme, District, Superior, County Court, or Court of Appeals.

(b) Time of Application. A request for a non-testimonial identification order may be made prior to the arrest of a suspect, after arrest and prior to trial or, when special circumstances of the case make it appropriate, during trial.

(c) Basis for Order. An order shall issue only on an affidavit or affidavits sworn to or affirmed before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed;

(2) That there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and

(3) That the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

(d) Issuance. Upon a showing that the grounds specified in a section (c) exist, the judge shall issue an order directed to any peace officer to take the person named in the affidavit into custody to obtain non-testimonial identification. The judge shall direct that the designated non-testimonial identification procedures have been completed, the person shall be released or charged with an offense.

(e) Contents of Order. An order to take into custody for non-testimonial identification shall contain:

(1) The name or description of the individual who is to give the non-testimonial identification;

(2) The names of any persons making affidavits for issuance of the order;

(3) The criminal offense concerning which the order has been issued and the non-testimonial identification procedures to be conducted specified therein;

(4) A mandate to the officer to whom the order is directed to detain the person for only such time as is necessary to obtain the non-testimonial identification;

(5) The typewritten or printed name of the judge issuing the order and his signature.

(f) Execution and Return.

(1) Non-testimonial identification procedures may be conducted by any peace officer or other person

designated by the judge. Blood tests shall be conducted under medical supervision, and the judge may require medical supervision for any other test ordered pursuant to this section when he deems such supervision necessary. No person who appears under an order of appearance issued pursuant to this section (f) shall be detained longer than is reasonably necessary to conduct the specified non-testimonial identification procedures unless he is arrested for an offense.

(2) The order may be executed and returned only within ten days after its date.

(3) The order shall be executed in the daytime unless the issuing judge shall endorse thereupon that it may be served at any time, because it appears that the suspect may flee the jurisdiction if the order is not served forthwith.

(4) The officer executing the order shall give a copy of the order to the person upon which is it served.

(5) No search of the person who is to give non-testimonial identification may be made, except a protective search for weapons, unless a separate search warrant has been issued.

(6) A return shall be made to the issuing judge showing whether the person named has been:

(I) Detained for such non-testimonial identification;

(II) Released or arrested.

(7) If, at the time of such return, probable cause does not exist to believe that such person has committed the offense named in the affidavit or any other offense, the person named in the affidavit shall be entitled to move that the judge issue an order directing that the products of the non-testimonial identification procedures, and all copies thereof, be destroyed. Such motion shall, except for good cause shown, be granted.

(g) Non-testimonial Identification Order at Request of Defendant. A person arrested for or charged with an offense may request a judge to order a non-testimonial identification procedure. If it appears that the results of specific non-testimonial identification procedures will be of material aid in determining whether the defendant committed the offense, the judge shall order the state to conduct such identification procedure involving the defendant under such terms and conditions as the judge shall prescribe.

(h) Definition of Terms. As used in this Rule, the following terms have the designated meanings:

(1) "Offense" means any felony, class 1 misdemeanor, or other crime which is punishable by imprisonment for more than one year.

(2) "Non-testimonial identification" includes, but is not limited to, identification by fingerprints, palm prints, footprints, measurements, blood specimens,

urine specimens, saliva samples, hair samples, specimens of material under fingernails, or other reasonable physical or medical examination, hand writing exemplars, voice samples, photographs, appearing in lineups, and trying on articles of clothing.

(i) Motion to Suppress. A person aggrieved by an order issued under this Rule may file a motion to suppress non-testimonial identification seized pursuant to such order and the said motion shall be granted if there were insufficient grounds for the issuance or the order was improperly issued. The motion to suppress the use of such non-testimonial identification as evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court, in its discretion, may entertain the motion at the trial.

STATEMENT OF THE CASE

This case is before the Court in an attempt to transform evidence inadmissible pursuant to Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 895 (1966), into admissible evidence through Miranda warnings given to an accused prior to custodial interrogation. Incriminating statements which placed the Respondent near the scene of a sexual assault were elicited from respondent during custodian interrogation on less than probable cause, a custodial interrogation made possible pursuant to a court order issued under Colorado Crim. P. 41.1.

Although the trial court admitted the statements, the Colorado Court of Appeals reversed, and this reversal was reiterated by the Colorado Supreme Court. Copies of the opinions of the Colorado Court of Appeals and the Colorado Supreme Court were attached to the Petition for Writ of Certiorari, filed by the Petitioner. Respondent is indigent, and presents this Opposition in forma pauperis, through legal counsel providing

representation services pro bono. For these reasons, the prior Court decisions are not attached to this Brief in Opposition.

Antonio Harris was a student at the University of Colorado, a member of the football team. On June 4, 1984, a young woman was sexually assaulted by two men on the university campus. One man grabbed her and dragged her into the bushes where another was waiting. Although she was mildly night-blind, the victim gave detailed descriptions of the men, who she said she had never seen before. The first assailant was described as black, clean-shaven, 6'1", 170 pounds, wearing a blue sweat or running jacket. The first man did not have the body of a football player, being "fairly tall and thin."

The second man, was a shorter, stockier black man approximately 5'7" to 5'9", weighing approximately 155 pounds. He had a moustache, glistening pomaded hair, and smelled of cologne. This assailant penetrated the victim and ejaculated.

Three days later, Antonio Harris was taken into custody at his place of employment under a Crim. P. 41.1 order for non-testimonial identification. He was transported by officers to a hospital, where he was to surrender pubic and head hairs, blood, and saliva, pursuant to the order.

After being taken into custody, Harris was advised of his Miranda rights, and questioned. The interrogating officer questioned Harris as to his whereabouts on the evening of the assault. Harris then provided details as to where he had been, who he had been with, and what he had been doing, placing himself

near the scene of the assault.

Questioning was conducted on the way to the hospital, at the hospital, on the way to the lineup, and at the lineup. Questioning ceased only when an attorney arrived, and asked the officer to stop. The officer later testified that the questioning was "part of the plan", that he intended to question Harris all along as he was "after information."

The victim identified Harris at the lineup as being the second, shorter assailant. Respondent did not match her contemporaneous description of that person at all, except for gender and race: Antonio Harris was described at trial as being broad-shouldered, taller, heavier, clean-shaven, and having no prior "history" of wearing heavy cologne or pomade on his hair. Later laboratory testing established that Harris could not have been the second assailant.

The sole issue at trial was identification. Substantial evidence of misidentification was introduced. For example, the victim had identified an apparently innocent student as having participated in the assault. Although she was "110% sure" that Harris was the second man, claiming to have a "very, very clear" recollection of that man, chemical testing conclusively excluded Harris.

Moreover, there was ample evidentiary support for this testimony, for although the victim repeatedly had told the police that both of the men were complete strangers, the victim had in fact worked with Antonio Harris at a restaurant, and had been '

seen talking to Harris there.

Additional evidence suggested that the actual perpetrators of the crime were Lonzo Harris and Ricardo Fortenberry, brother and cousin of Respondent. In another lineup, Lonzo Harris was identified the victim as being one of the assailants; Lonzo Harris was identified by a waitress who saw these two men together earlier in the evening.

Ricardo Fortenberry strongly resembles his cousin Antonio Harris, having been mistaken for him just two days before the assault. Fortenberry fit the description of the second assailant, corresponding closely in both height and weight, having a moustache, wearing his hair "wet or shiny", and being strongly cologned just a few hours before the assault.

In addition to these physical characteristics, chemical testing revealed that Fortenberry fell into the 2% of the population who could be the source of semen recovered. Substantial identification and scientific evidence thus implicated Lonzo Harris and Fortenberry as the true perpetrators.

Moreover, Lonzo Harris and Ricardo Fortenberry were implicated in the abortive kidnapping of another young woman, the very next evening. These two men fit the descriptions of the kidnappers, and Fortenberry later confessed his involvement. After introduction of considerable evidence implicating Lonzo Harris in the second abduction, the prosecution stipulated that he was one of the kidnappers. Despite this substantial evidence

of misidentification, however, the jury convicted Antonio Harris.

Argument

STATEMENTS ELICITED FROM ANTONIO HARRIS DURING CUSTODIAL INTERROGATION ON LESS THAN PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT, RENDERING INADMISSIBLE THOSE STATEMENTS AT TRIAL.

This case is governed by Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969). In Davis v. Mississippi, this Court held unconstitutional custodial questioning on less than probable cause. In so doing, the Court intimated that non-testimonial identification procedures might be lawful on a showing of less than probable cause, but specifically excluded questioning as lawful under the Fourth Amendment, in the absence of probable cause to arrest.

In response to Davis, Colorado and a handful of other states enacted statutes and procedural rules permitting compelled custodial non-testimonial procedures.[1] Before Davis, there was no authority for the proposition that a person could be seized for fingerprint or other non-testimonial identification procedures. In Davis, this Court invalidated a custodial seizure on less than probable cause which resulted in fingerprint evidence implicating the accused. In reversing, the Court implied, that "under narrowly defined circumstances" seizure for fingerprinting might comply with the Fourth Amendment even in the absence of probable cause. This Court found noteworthy the

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[1] See, e.g., Ariz. Rev. Stat. Ann. § 13-1424; Idaho Code § 19-625(2)(C); Utah Stat. Ann. § 77-8-1 (Repl. 1982); Iowa Code §§ 810 et seq. (West 1979 & Supp. 1983); N. C. Gen. Stats. §§ 15A-271 et seq. Repl. 1978); Neb. Rev. Stat. § 29-3305(6).

absence of probable cause, the fact that Davis was unnecessarily printed twice, and the fact that he was "subjected to interrogation."

This case presents an issue squarely governed by Davis: custodial interrogation upon less than probable cause. The Colorado Supreme Court held that the custodial questioning of Antonio Harris was in violation of the Fourth Amendment, and Davis v. Mississippi. There is no reason for this Court to review that indubitably correct decision.

The State of Colorado is basically asking this Court to permit the Davis exception to subsume the rule precluding custodial interrogation on less than probable cause. It is important to evaluate the Petitioner's argument for what it is: an attempt to do away with the probable cause requirement for arrest. This is so because, when Rule 41 of the Colorado Rules of Criminal Procedure is considered, it is apparent that only two things differentiate a Rule 41 seizure from a full-scale arrest: the absence of an opportunity for release on bond, and the absence of questioning.

Historically, probable cause has been required in order to prevent arrests based on mere suspicion, rumor, or an officer's desire to engage in "investigatory questioning." Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). Colorado Crim. P. 41 authorizes limited intrusions into personal privacy for non-testimonial identification procedures, procedures which go far beyond those discussed in Davis. Unquestionably,

more invasive procedures require probable cause, and nothing less. Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973)(fingernail scrapings); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)(blood).

The detention Respondent was subjected to was not voluntary: he was manifestly not free to go, and the investigating officer sought from the very start to elicit incriminating statements, at a time when Respondent was susceptible to custodial interrogation and questioning. The coercive character of custodial interrogation formed the basis of this Court's opinion in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 16 L.Ed.2d 694 (1966):

> [W]ithout proper safeguards, the process of in-custody interrogation of persons suspected or accused of a crime contains inherently compelling pressures which work to undermine the individual's will to resist and compel him to speak where he would otherwise do so freely.
> (1) That there is probable cause to believe that an offense has been committed;
> (2) That there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and
> (3) That the results of specific non-testimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense.

The coercive effect of a detention for non-testimonial procedures may in fact be greater than that of a custodial arrest on probable cause, at least where, as here, the accused is taken into custody unexpectedly, and is then subjected to substantial and probably unanticipated bodily intrusions. Rarely is legal

counsel available.[2] Such persons are usually apprehended without warning, taken into custody, and told that they will have to give up bodily fluids, hair samples, fingerprints, or appear in a lineup, all without the benefit of counsel or hearing. In this case, Antonio Harris, a twenty-year old student, was whisked from job site to hospital, where pubic hairs were removed, head hair samples were selected, blood was removed from him, and a saliva sample was extricated.

Miranda rights alone do not obviate the unconstitutional questioning. Miranda warnings are not a "cure-all" for unconstitutional seizures. Brown v. Illinois, 442 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). As was held in Brown, the Fourth and Fifth Amendments "coalesce" in cases such as this because illegal arrests "are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment." Thus, although Miranda warnings "effectuate the Fifth Amendment", such warnings are "insufficient fully to protect the Fourth."

Miranda warnings are not a panacea for all constitutional ills; they do not "wipe the slate clean." See Brown v. Illinois, supra. In this appeal, the People argue to the contrary, that by answering questions propounded after Miranda warnings were given,

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[2] The arrival of counsel in this case occurred "after the horse was out of the barn," and apparently fortuitously. Both Idaho and North Carolina require the presence of defense counsel at non-testimonial identification procedures before questioning can lawfully occur. Idaho Code § 19-625(2)(H); N.C. Gen. Stats. §§ 15A-279(d)(1974).

Antonio Harris waived both his Fourth and Fifth Amendment rights. This is not the law. As was stated in Dunaway v. New York, supra, such an argument:

> betrays a lingering confusion between "voluntariness" for purposes of the Fifth Amendment and the "causal connection" test established in Brown. Satisfying the Fifth Amendment is only the "threshold" condition of the Fourth Amendment analysis required by Brown. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit the petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.

In this case, the Colorado Supreme Court properly held that Colo. Crim. 41.1 does not permit custodial questioning during a limited seizure for non-testimonial purposes. "Non-testimonial" means non-testimonial.[3] The issue is not, as claimed by

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[3] One commentator, writing contemporaneously with the enactment of Crim. P. 41.1 and a similar Arizona statute, remarked that, to be constitutional, such seizures for non-testimonial identification procedures:

> Must be narrowly defined and controlled. Only those procedures authorized by the court order should be tolerated. To allow the statute to be used for purposes of interrogation on less than probable cause would be an intrusion into the area of communicative evidence that would assuredly be unconstitutional.

Drake, Detention for Taking Physical Evidence Without Probable Cause, 14 Ariz. L.Rev. 132, 154 (1972).

Indeed, the A.L.I. Model Penal Code of Pre-Arraignment Procedure (1975) provides in § 170.7(4) that:

> No person while detained pursuant to a non-testimonial identification order shall be subject to "questioning"...

See also Iowa Code §§ 810.8(5)(West 1979 & Supp. 1983); N.C. Gen. Stats. § 15A-278(6); Neb. Rev. Stat. § 29-3305(6).

Respondent, whether the police may "talk" to a suspect in custody. There is a big difference between volunteered statements, casual conversation, and custodial interrogation.

Here, the statements were intentionally obtained, on questioning: it was "part of the plan" to question Harris. The officers knew that Harris was the focus of the investigation, and wanted to get information from him. According to the officer, questioning here was initially designed to "develop rapport", so that he could obtain details to "check out later." Questioning had been planned all along. Indeed, the interrogating officer attempted to tape-record the conversations, but accidentally failed to activate the recorder. Under these circumstances, it is disingenuous to argue that the police simply "talked to" Respondent.

Nor is this a case where a policeman questioned someone on the street, where there were "no intimidating circumstances." (Petition for Writ of Certiorari, pp. 7, 9). The coercive character of custodial questioning was clearly characterized in Miranda, and its considerable progeny. It matters not how long Respondent was in custody; rather, what is at issue is the scope of the Rule 41.1 seizure, and the extent to which the police are permitted to custodially question in the absence of probable cause.

See also Iowa Code §§ 810.8(5)(West 1979 & Supp. 1983); N.C. Gen. Stats. § 15A-278(6); Neb. Rev. Stat. § 29-3305(6).

CONCLUSION

The Colorado Supreme Court properly held that Antonio Harris' rights were violated when the statements made by him during the Rule 41.1 seizure were admitted into evidence at trial. There is no valid reason for this Court to review by Certiorari the decision of the Colorado Supreme Court in this case, as it is consistent with, and compelled by, Davis v. Mississippi, supra, and Brown v. Illinois, supra.

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